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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GREGORY CHARLES RHOME, Petitioner.	)	2 CA-CR 2007-0095-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CR200400269, CR200400270, and CR200400924 (Consolidated)

Honorable Thomas E. Collins, Judge

REVIEW GRANTED; RELIEF DENIED

Gregory Charles Rhome — Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to separate plea agreements spanning three different cases, petitioner Gregory Charles Rhome was convicted of eight felonies. He pled guilty in November 2005 to six of the eight charges—aggravated assault, escape, and two counts each of criminal damage and fleeing from or attempting to elude a pursuing law enforcement vehicle—and

pled no contest to one count each of endangerment and resisting arrest. Additional charges pending in a fourth case were dismissed as part of the plea agreements, which also called for Rhome to receive a "cumulative sentence" of five to fifteen years in prison. The trial court imposed a combination of concurrent and consecutive, aggravated sentences totaling 8.5 years' imprisonment and ordered Rhome to pay over $3,000 restitution.

¶2 Rhome filed an of-right petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. In it, he contended that, despite finding Rhome's longstanding mental illness to be a mitigating factor, the trial court had failed to give that factor sufficient weight in concluding that the aggravating factors outweighed the mitigating. Rhome essentially claimed the trial court abused its discretion in imposing the maximum possible sentence based on the single aggravating factor of Rhome's criminal record. He also claimed the court had wrongly failed to grant him 381 days' presentence incarceration credit to which he was entitled in one of the three cases. Twenty-three days after Rhome filed his petition, the trial court denied relief, stating in its minute entry that it had "carefully considered as mitigation the facts related to Defendant's history of mental disorders." This pro se petition for review followed.[1]

[1]The trial court did not separately address Rhome's claim for presentence incarceration credit in its minute entry of December 29, 2006, denying relief. Rhome subsequently filed a motion for reconsideration, to which the state responded by conceding Rhome was entitled to the additional credit. The trial court then granted the motion for reconsideration, awarding Rhome credit for 381 additional days of time already served.

¶3 We will not disturb a trial court's ruling on a petition for post-conviction relief unless it is clear the court abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Determining the appropriate sentence to impose in any given case likewise rests entirely within the trial court's discretion. *State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978). "An abuse of discretion occurs when the decision is characterized by capriciousness or arbitrariness or by a failure to conduct an adequate investigation into the facts necessary for an intelligent exercise thereof." *Id*. On review, we will rarely interfere with the trial court's discretion if the record supports its finding of aggravating circumstances and the sentence imposed is within the range authorized by statute. *State v. Webb*, 164 Ariz. 348, 354-55, 793 P.2d 105, 111-12 (App. 1990).

¶4 Both below and in his petition for review, Rhome has presented cogent arguments that his assorted, longstanding, and serious mental illnesses were entitled to substantial weight as mitigating factors. The presentence report states:

> Court reports further indicate that the defendant has had medical emotional, and psychological problems throughout his life. As a young boy, the defendant described falling off a fence and injuring his skull and brain, he said he recovered from the accident, but later in life he said he suffered another brain injury during a fight. Additional reports list the defendant having problems with depression and anxiety; Rhome added that he was diagnosed at the age of 18 as having a bi-polar disorder. . . . [S]ince January of 2004, jail officials report that Rhome has been taking daily doses of prescribed Lexapro, remains stable, and shows no signs of uncontrollable anger. According to Rhome, while in the jail, he attends self-help and religious programs, and is helping other inmates deal with

> incarceration. . . . (A check with jail staff verified his statements.)

¶5 At the aggravation-mitigation hearing preceding sentencing, psychiatrist Barry Morenz, who had evaluated Rhome pursuant to Rule 11, Ariz. R. Crim. P., 16 A.R.S., testified that Rhome suffers from a variety of mental disorders. Morenz diagnosed polysubstance abuse, particularly alcohol abuse; an intermittent explosive disorder, which Morenz described as "precipitous periods of anger and aggression that [are] out of proportion to any kind of stress or provocation," possibly related to the earlier brain injuries Rhome had suffered that make it harder for him to modulate his emotional response to events; a dissociative disorder that results, during his "periods of extreme anger," in Rhome's at times "not [being] fully aware of what he is doing or what is transpiring"; and longstanding problems with anxiety, depression, and unstable moods that cause him to have "difficulty remaining calm."

¶6 Although the trial court found Rhome's mental illness to be a mitigating factor because it impaired his capacity to appreciate the wrongfulness of his conduct and conform his behavior to the requirements of the law, the court found the aggravating factor of Rhome's prior criminal history outweighed the mitigating factor of his mental illness and justified the imposition of aggravated sentences on all counts. That history consisted of two prior felony convictions within the preceding ten years—for aggravated assault and aggravated driving under the influence of an intoxicant, both in 2001—and six misdemeanor

convictions. "As a matter of fact," the court observed at sentencing, "I've never seen a rap sheet that had the word assault on it so many times." The court expressed its concern that Rhome posed a real danger to the community, particularly when under the influence of alcohol or other substances, and noted his past inability to control his behavior or abstain from alcohol or drugs.

¶7 We note the evidence that, after Rhome was prescribed and began taking Lexapro for the first time while in jail on the instant offenses, he experienced significant improvement in his symptoms and behavior as a result. We also acknowledge the possibility that Rhome's prior criminal history was itself a product of his mental illness and that another court might well have weighed the aggravating and mitigating factors differently and imposed a lesser sentence. But whether this court might or might not have imposed a different sentence is not the test of whether the sentencing court abused its discretion. *See State v. Davidson*, 19 Ariz. App. 346, 348, 507 P.2d 685, 687 (1973) (in reviewing allegedly excessive sentence for abuse of discretion, "question before us is not whether we should second-guess the trial judge and determine that had we been in his position we might have entered a different sentence").

¶8 Ultimately, "[h]ow much weight should be given proffered mitigating factors is a matter within the sound discretion of the sentencing judge." *State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996). The cases Rhome has cited in arguing that his mental illness and impaired capacity were entitled to more weight in mitigation—*e.g.*, *State v.*

Trostle, 191 Ariz. 4, 951 P.2d 869 (1997); *State v. Stuard*, 176 Ariz. 589, 610, 863 P.2d 881, 902 (1993)—are not controlling because they were capital murder cases. Those defendants were sentenced pursuant to A.R.S. § 13-703 rather than A.R.S. § 13-702, and, by statute, the supreme court is required in death penalty cases to "independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence," A.R.S. § 13-703.04(A), and to impose a life sentence if it finds the evidence in mitigation "is sufficiently substantial to warrant leniency." § 13-703.04(B).

¶9 Here, in contrast, we have no authority to "independently review" or reweigh the evidence presented in aggravation or mitigation. Our role is limited to determining whether the trial court abused its discretion, and we are not permitted to substitute our judgment for its own. Because the trial court had before it and obviously did consider all pertinent information before imposing sentences within the range permitted by statute and by Rhome's plea agreements, we cannot say the court abused its discretion, either in sentencing Rhome initially or in denying post-conviction relief after reconsidering the sentences it had originally imposed. *See Patton*, 120 Ariz. at 388, 586 P.2d at 637; *Webb*, 164 Ariz. at 354-55, 793 P.2d at 111-12.

¶10 Finally, Rhome seeks to assert in his petition for review a claim pursuant to *Cunningham v. California*, ___ U.S. ___, 127 S. Ct. 856 (2007), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), that the trial court erred by applying a preponderance of the evidence standard in determining the existence of aggravating factors,

which in Rhome's case consisted only of his prior criminal convictions. Even had the issue not been waived by counsel's failure to raise it in Rhome's petition below, it lacks merit for two reasons: first, because prior convictions are expressly exempt from the requirements of *Cunningham*, ___ U.S. ___, 127 S. Ct. at 860; *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536; and *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000); and, second, because paragraph fourteen in each of Rhome's three plea agreements provides: "By entering into this agreement the Defendant agrees that the Court may find any fact used to impose sentence to be true by a preponderance of the evidence, and that the Court is not bound by the Rules of Evidence in determining what evidence to consider."

¶11 Accordingly, we grant the petition for review, but, for all the foregoing reasons, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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GARYE L. VÁSQUEZ, Judge

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J. WILLIAM BRAMMER, JR., Judge